

# **Charles L. Black, Jr.: Commitment, Connection, and the Ceaseless Quest for Justice**

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## **I. PROLOGUE**

It is my extraordinary good fortune to teach and to be the dean at the William S. Richardson School of Law, University of Hawai’i at Mānoa. There are many reasons why this is so, and these reasons extend far beyond the opportunity to try to shape the future through a remarkably diverse, hardworking, nice, and impressive group of students. My sense of being extremely lucky also stretches well past the regular chance to interact with an unusually cohesive faculty and staff, warmly supported by alumni and friends of a great Law School.

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This Law School almost surely matters more to Hawai‘i than any other law school matters to its home state. This is in part because Hawai‘i actually has the chance to move against the grain of much of today’s dominant legal culture. It may be that island living underscores the importance of mutuality. Paradoxically, we are also keenly aware of serving as a crossroads as well as a gathering place. (O‘ahu, the name of this island, is “the gathering place” in Hawaiian.) Lawyers and law students in Hawai‘i seem to understand more than most of our counterparts that a narrow sense of self-interest and a focus on the bottom line simply will not do within our interconnected world.

In Hawai‘i, harmonizing powerful pluralistic claims is a particularly pressing issue. The challenge of finding remedies or reconciliation occurs against the backdrop of a myriad of uninvited guests who frequently have behaved badly toward both the host culture and the strikingly beautiful environment of Hawai‘i. And history seems much closer to the surface here than in most places. Even lawyers tend to understand that legal problems are primarily people problems. We are simultaneously blessed and cursed by intersecting human relationships among people who are likely to be repeat players, no matter what immediate solutions emerge from their legal disputes.

The influence of Asia and the Pacific as well as the fragility of our stunningly inviting environment underscore the importance of finding legal approaches that offer not only formal rules and foreseeability, but also protection and equity. We must seek justice along with law, righteousness along with rules.

In seeking to learn something about such matters from the perspective of a longtime teacher and writer about American constitutional law and legal history, I have had the pleasure of reflecting upon a model provided by my teacher and friend, the late Charles L. Black, Jr. As I hope will become apparent in the essay that follows, Charles Black also used law and legal ideas to work against the grain to confront some of the grossest injustices of his time.

In remembering Charles Black, I certainly do not claim that his work as a marvelous legal thinker, lawyer, and wordsmith even came close to solving the weighty problems he attacked. I do mean to assert, however, that his work has much to teach, well beyond his particular place and time. Charles Black emphasized that words matter, and that lawyers and judges are obliged to use the powerful words of our profession in the pursuit of justice. This is the case, even

if we recognize that we will never get to put our arms around the justice we are nonetheless obliged to seek.

## II. LAW EMPHATICALLY A HUMAN CONSTRUCT

Professor Black had an uncanny ability to identify and to describe ongoing, current injustices that had become so engrained as to seem normal and natural to most people. He linked this power of naming the names of injustice with an unswerving demand that legal action must be taken to do something now, for the present as well as for the sake of a better future.

Attending to Black's great legal craftsmanship and his superb skill as a wordsmith is itself wonderfully instructive. But even more is to be learned from his vivid understanding that law is a human construct. Within law, in fact, words have considerable power – including the power to change what was previously thought to be immovable.

Charles Black's work is even more directly relevant to our new millennium because of his prescient recognition that governments have affirmative obligations to do the right thing, particularly on behalf of the most vulnerable. Law, then, ought to be first and foremost an effective force that is utilized to anchor those abiding obligations – expressed in grand, ideal promises and covenants – to assist in the nitty-gritty daily lives of those in great need of social justice.

In particular, Black's words and deeds speak cogently to the current constitutional situation in Hawai'i and around the Pacific. We confront jagged yet basic questions of sovereignty, local autonomy, and the appropriate role of courts. We also are obliged to try somehow to remedy past wrongs while also, one may hope, reconciling deep present differences. Through consideration of how Charles Black arrived at his singular insights and commitments, it is possible to build and to extrapolate on a worthy model for social change.

## III. A YOUNG WHITE SOUTHERNER ENCOUNTERS GENIUS IN LOUIS ARMSTRONG

When Charles L. Black, Jr. joined the Columbia Law School faculty in 1947, it was almost inconceivable that a white Texan would also join the NAACP campaign against segregation. It also seemed to

defy reality that a professor at a leading law school would proclaim that, since he had been sixteen years old, "Louis Armstrong has been a continuing presence in my life."<sup>2</sup> Yet with characteristic verve, in "My World with Louis Armstrong,"<sup>3</sup> Black explored the direct connection.

Unpredictable yet mutually beneficial connections characterize much of Charles Black's work as a scholar, teacher, advocate, and exemplar of crucial border crossing between law and music, and between poetry and potent demands for justice. Armstrong's jazz genius, Black explained, had a lot to do with why, at a celebration of the *Brown v. Board of Education*<sup>4</sup> victory held at the Savoy Ballroom in Harlem in 1955, Thurgood Marshall introduced Charles to the crowd with these words: "And next over there is Charlie Black, a white man from Texas, who's been with us all the way."<sup>5</sup>

Remembering Louis Armstrong, Black recalled that he first began to put crucial things together when he went to a dance in Austin, Texas for "the girls," and he heard Armstrong play. As Black put it: "It is impossible to overstate the significance of a sixteen-year-old Southern boy's seeing genius, for the first time, in a black."<sup>6</sup> Moreover, he connected deepening appreciation of the "quality of inevitability that so often marks great music"<sup>7</sup> with a developing understanding of the caste system of the South. He came to grasp "the whole complex net of its senseless cruelties and crippling, as no mere accidental grotesquerie of history, but rather as that most hideous of errors, the prima materia of tragedy, the failure to recognize kinship."<sup>8</sup>

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<sup>2</sup> Charles L. Black, Jr., *My World with Louis Armstrong*, 69 YALE REV. 145 (1979), reprinted in 95 YALE L.J. 1595, 1596 (1986).

<sup>3</sup> *Id.* at 1595.

<sup>4</sup> 349 U.S. 294 (1955).

<sup>5</sup> *My World with Louis Armstrong*, *supra* note 1, at 1595.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1598.

<sup>8</sup> *Id.* at 1599.

The history of Hawai'i, in many respects echoed in lands across the Pacific, cries out with similar "senseless cruelties andcrippings."<sup>9</sup> Local caste systems have been similarly anchored to "the failure to recognize kinship."<sup>10</sup> And it is the rare lawyer or small group of lawyers who, like Charles Black and his compatriots, find ways to pierce the veil and to utilize law to challenge the complacency of the legal status quo on such a fundamental issue of human equity.

Both Black and Armstrong were extraordinary but also lonely figures. Armstrong was much-criticized when he condemned President Eisenhower's initial failure to control violent resistance to school integration in Little Rock in 1957, saying: "Do you dig me when I say, 'I have a right to blow my top over injustice.'"<sup>11</sup> Jazz critic Stanley Crouch wrote of Louis Armstrong: "His freedom, his wit, his discipline, his bawdiness, his majesty and his irrepressible willingness to do battle with deep sorrow and the wages of death give his music a perpetual position in the wave of the future that is the station of great art."<sup>12</sup> Armstrong put things together in music as no one else could.

Black, too, made vivid connections and did battle against deep sorrow, even when his colleagues insisted on pulling things apart. Both artists beautifully blended what others sought to separate. If extraordinary craftsmanship and courage in making music can connect with passionate skill in pursuing justice, Louis Armstrong and Charles Black, Jr. share significant space that extends well beyond the mainstream.

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<sup>9</sup> See, e.g., Jonathan K. K. Osorio, *DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887* (2002); Ronald Takaki, *RAISING CANE: THE WORLD OF PLANTATION HAWAII* (1994); Apology Resolution, S.J. Res. 19, 103d Cong., Pub. L. No. 103-150, 107 Stat. 1510 (1993) (Joint Resolution passed by Congress "to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawai'i.").

<sup>10</sup> See, e.g., Lili'uokalani, *HAWAII'S STORY BY HAWAII'S QUEEN* (pap. ed. 1990); David Stannard, *HONOR KILLING* (2005).

<sup>11</sup> *Louis Armstrong: A Cultural Legacy*, Smithsonian National Portrait Gallery (2000) available at <http://www.npg.si.edu/exh/armstrong/>.

<sup>12</sup> Stanley Crouch, *Time 100: Louis Armstrong* at 4, available at <http://www.time.com/time/time100/artists/profile/armstrong4.html>.

## IV. LEGAL EDUCATION IN THE 1950S

Through the myths and the mists of a half-century, it has become nearly impossible to grasp how much fear of judicial activism dominated American legal education in the years surrounding World War II, when Black attended Yale and then began to teach at Columbia. Justice Felix Frankfurter served as exemplar of an oft-proclaimed institutional principle, “the passive virtues,”<sup>13</sup> and his many influential clerks and academic admirers helped lead a nationwide celebration of such passivity.

In classrooms, scholarly articles, and the popular press, the Legal Process school insisted on a self-consciously modest judicial role.<sup>14</sup> Judges had to remain sensitive to preserving their sharply limited supply of judicial credibility. It was as if American judges—particularly federal judges—were players in an ongoing, high-stakes poker game that pitted law against politics. Judicial credibility chips were in short supply, it was widely believed, because the chips already had been distributed appropriately, according to the comparative institutional advantages and disadvantages of the branches of government. Unelected judges who seemed to oppose the will of the majority might legitimately deal only “adequate neutral principles” – as Columbia’s Herbert Wechsler put the point in a famous 1958 Harvard law review article criticizing the Supreme Court’s activism in *Brown*.<sup>15</sup> Wechsler argued for a sharp division of facts from law, procedure from substance, and what is from what ought to be.

Upon leaving Columbia and returning to Yale to teach in 1957, Black soon found that elite schools, such as Columbia and Yale, tended to agree with Wechsler generally as they overreacted to two important legal trends. First, the law schools were anxious to escape the skepticism about law that the legal realists unleashed before World War II, a skepticism that easily could be caricatured as

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<sup>13</sup> Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961).

<sup>14</sup> See Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1 (1999).

<sup>15</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (questioning the neutrality, and hence the legitimacy, of *Brown*).

nihilism that cut across the grain of American ideals. Also the schools sought to repress the tradition of judicial intervention that repeatedly had struck down progressive legislation in the decades from the 1890s through 1937.<sup>16</sup> According to historian Laura Kalman, leading academics in the post-war era strove to restore the belief that the people and not judges would select the rules which governed the country; that judicial review served to reinforce representative government; and that the United States again would be a government of laws, and not of men.<sup>17</sup> Charles Black resounded to a different drummer. Throughout his career, he combined legal realism with text-based claims for judicial activism in pursuit of basic justice.

When Charles Black died in May 2001, the legal world lost a unique scholar-activist, a remarkable stylist in deeds as well as words, and a “miscellanist” without peer. Black further stood out because, unlike most of his peers, he managed to find and sustain inspiration within law. He did so despite the fact that he spent much of his professional life observing and commenting on the disappointments wrought by the Supreme Court, Congress, and the Presidency. As Jack Greenberg, a long-time comrade in the work of the NAACP Inc. Fund pointed out, this was in part because Black was not scared to lose.<sup>18</sup> Black continued to insist that “skilled and tireless advocacy, returning again and again to insist on the rightness of its cause, can make new law.”<sup>19</sup>

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<sup>16</sup> From 1937 until quite recently, the Supreme Court was much more tolerant of federal intervention in the country’s economic and social problems than it had been before Franklin D. Roosevelt unsuccessfully challenged but then changed the Court. *Compare, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942) with *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>17</sup> LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986).

<sup>18</sup> Jack Greenberg, *In Tribute to Charles L. Black, Jr.: Charles L. Black, Jr.*, 95 *YALE L.J.* 1559, 1564 (1986).

<sup>19</sup> Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 *WASH. L. REV.* 3, 14 (1970).

## V. RACISM AND JUSTICE AS THE BUSINESS OF LAW

Black grew up in intensely segregated Texas between the century's big wars. After his early encounter with Louis Armstrong, it became absolutely clear to him that "if justice is the business of law, then, easily and by far, the first item on our law's agenda is and always ought to have been the use of every resource and technique of the law to deal with racism."<sup>20</sup> As a child of the Depression and a young man during World War II, Black saw little to fear in government power employed to improve the lot of ordinary citizens. But he stood apart in his insistence that the ordinary tools of legal reasoning reveal that fundamental American constitutional law imposes an affirmative duty on government to protect the rights of all citizens effectively.

The Civil War Amendments were central to Black's constitutional faith. He departed radically from most of his contemporaries in understanding that the Thirteenth, Fourteenth, and Fifteenth Amendments affirmatively promised to protect basic civil rights. He persuasively argued, for example, the significance of the Fourteenth Amendment's explicit guarantee of national and state citizenship as well as its promise to protect privileges or immunities.

Writing and litigating against racism became Black's path to compelling the United States to ensure meaningful national citizenship. Black believed that to recognize "the symmetries of social obligation"—this was one of the phrases with which he refocused the issue of "state action" in a series of extraordinary Supreme Court briefs he wrote for the NAACP Inc. Fund in the early 1960s—would improve common life at ground level.<sup>21</sup> Such recognition would also serve the country's most profound aspirations. Once Black got through carefully taking apart the Supreme Court's decisions in the *Slaughterhouse Cases*<sup>22</sup> and the *Civil Rights Cases*,<sup>23</sup> it became impossible for anyone who read him with care to ignore

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<sup>20</sup> Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 69-70 (1967).

<sup>21</sup> Brief for Petitioners at 40, *Barr v. City of Columbia*, 378 U.S. 146 (1964).

<sup>22</sup> 83 U.S. 36 (1873).

<sup>23</sup> 109 U.S. 3 (1883).



how the Supreme Court's astonishingly sloppy and crabbed vision of national rights in these and other decisions contributed to the national tragedy of the rise of Jim Crow.<sup>24</sup> Black liked to play variations on a favorite theme: "We need something better."<sup>25</sup> More than any other constitutional law scholar writing during the last half century, he made the case for what such a better way to protect human rights might be.

## VI. CELEBRATING ACTIVE JUDICIAL REVIEW

In the first of his half-dozen books about constitutional law, *The People and the Court*,<sup>26</sup> Black swam against what was becoming a riptide. He had the courage to examine and to celebrate active judicial review. Black did this during an era that emphasized the relative competencies of governmental decision-makers and that assumed that courts ought to conserve their credibility by generally deferring to more democratically accountable branches. Judges were to be acutely aware of the constraints inherent in their function as "the least dangerous branch," a phrase from *The Federalist Papers* used as the title of an influential book by Alexander Bickel, a former Frankfurter clerk who was Black's colleague and friend at Yale Law School.<sup>27</sup> (Black explained that he and Bickel "agreed about everything except our opinions.")<sup>28</sup> Black argued to the contrary that active judicial review serves most crucially, paradoxically, to legitimate activity by the government.

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<sup>24</sup> See, e.g., CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED* 55-85 (1997).

<sup>25</sup> Charles L. Black, Jr., *"One Nation Indivisible": Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 47 (1991).

<sup>26</sup> CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960).

<sup>27</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

<sup>28</sup> Black made this crack while teaching at Yale Law School in the 1970s, as confirmed by the author in a January 6, 2005 conversation with Fred Lawrence, then a professor at Boston University School of Law and currently dean and professor at George Washington University Law School.

This active judicial role, he explained, requires that the judiciary retain clear power to invalidate the actions of the other federal branches and the states. When he wrestled with the question of what judges are to do when asked for their judgments in a post-legal realist world, Black considered what happens when we realize that law “has no demonstrable existence outside the facts of life,”<sup>29</sup> and also that “law *exists* as words.”<sup>30</sup> It is crucial that the Constitution is law, and that law requires interpretation. Unlike virtually all his white male contemporaries, to Black the Constitution—read carefully—promises a national regime of human rights. It obliges us to go to court as well as to Congress, and to continue to seek to liberate people “from constriction or fear.”<sup>31</sup> Black believed this even though, or perhaps because, as someone with a profound grasp of human nature, he knew the struggle would be eternal and any success necessarily would be limited.

In addition to noteworthy essays published in Black’s honor when he left Yale Law School to return to Columbia in 1986, Yale<sup>32</sup> and Columbia<sup>33</sup> law reviews simultaneously published vivid memorial collections. Black taught constitutional law and admiralty at these two schools for nearly fifty years and he had a way of bringing out the best in people. Many more law review articles and symposia about his important scholarly work are scheduled. Black also managed to be extraordinary in an unusual number of professional roles. Throughout all of them, he persisted in an often lonely quest to identify and to implement the pressing possibilities already embedded in American law. Charles Black possessed a rare quality that he greatly admired in Chief Justice John Marshall – he was exceptional for his “sublime audacity”<sup>34</sup> to make better law using the available basic legal tools.

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<sup>29</sup> THE PEOPLE AND THE COURT, *supra* note 26, at 161.

<sup>30</sup> *Id.* at 162.

<sup>31</sup> *Id.* at 88.

<sup>32</sup> 111 YALE L.J. 1897-1909 (2002).

<sup>33</sup> 102 COLUM. L. REV. 870-880 (2002). *See also* “Symposium: Charles L. Black, Jr.,” 92 GEO. L.J. 709, et seq. (2004).

<sup>34</sup> I have not been able to retrieve the citation but I am almost certain that Charles Black used “sublime audacity” somewhere; he might well have

## VII. REASONING FROM COMMITMENT

Black was rightfully famous for doing many very different things, and for doing them with such originality and panache that the label “eccentric” stuck early and often. Serious and consistent themes connected his many roles, however. He celebrated and demonstrated good lawyering, for example, though doing so remains a surprisingly rare phenomenon in legal academia. He also repeatedly stepped outside the commonplace to challenge accepted wisdom with verve. Yet he anchored the solutions he discovered well within the craftsmanship available to good lawyers and to practical judges seeking to be equitable. To Black, law—like other human institutions—requires commitment of the heart, but at best can claim only the still uncertain logic of probability. Like Louis Armstrong, Black embodied vivid originality within constraints.

When Black was over 80 years old, he published an important final book, *A New Birth of Freedom: Human Rights, Named and Unnamed*,<sup>35</sup> in which he convincingly melded the nation’s commitment to secure the rights of all citizens from the time of the Declaration of Independence through the Ninth Amendment to the post-Civil War era’s Second Constitution. In the book’s Preface, Charles thanked his wife—Columbia Law School professor and former dean Barbara Aronstein Black—“for everything.” This expression of gratitude, he said, was simply “one more repetition of a thought never absent from my heart.”<sup>36</sup> This sweet turn of phrase contains a direct challenge, characteristic of Black, to the classic dichotomy that separates head from heart. It also serves as a vivid grace note to his consistent insistence—for over half a century throughout a remarkably multifaceted engagement with American

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remembered the phrase from either Henry Wadsworth Longfellow’s “Morituri Salutamus: Poem for the Fiftieth Anniversary of the Class of 1825 in Bowdoin College,” available at <http://eir.library.utoronto.ca/rpo/display/poem1334.html> or from Victor Hugo’s “Letter to the London News regarding John Brown,” available at <http://www.gavroche.org/vhugo/londonnews.gav>.

<sup>35</sup> CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997).

<sup>36</sup> *Id.*

law—that to think clearly about law requires “reasoning from commitment.”<sup>37</sup>

Part of Black’s inspiration for radical thought within the boundaries of law began when he was assigned to teach admiralty and equity at the beginning of his teaching career. With Grant Gilmore, Black proceeded to produce two editions—nearly twenty years apart—of what quickly and lastingly proved to be the leading American treatise in admiralty,<sup>38</sup> famous for its snappy writing and its functional rather than doctrinal emphasis. Black’s early focus on practical as well as equitable remedies also became part of a life-long quest for “reason supporting justice, reason subtly and flexibly adapting to the gross and fine-grained differences in life.”<sup>39</sup> Indeed, Black liked to provide specific examples drawn from admiralty’s expansive sense of jurisdiction and its imaginative concern for the welfare of seamen. “Having specialized in racism and admiralty,” he wrote, “I have long thought that all we need in legal method, to get all we need in the field of racial equality—at least so far as a court can give it to us—is that the Thirteenth, Fourteenth and Fifteenth amendments be read in the same spirit as the admiralty clause.”<sup>40</sup>

Simply put, Black unquestionably was one of the leading constitutional law scholars of the twentieth century. He was the first to say many important things so widely accepted now that his pioneering role has been absorbed into the mainstream, and his innovating role has been forgotten. For example, he convincingly demonstrated that attending to the structure and relationship of constitutional language within the entire constitutional text should be an essential interpretive approach. Black knew and loved words, so he insisted on heeding their context. He had majored in Classics at the University of Texas and initially came to Yale to do graduate

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<sup>37</sup> *Id.* at 5.

<sup>38</sup> GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* (1st ed. 1957) (2d ed. 1975).

<sup>39</sup> Once again, I have not found this citation again either, but Black said it somewhere within his uncanny craftsmanship in weaving the threads between law, policy, and social concerns.

<sup>40</sup> *The Unfinished Business of the Warren Court*, *supra* note 18, at 17.

work in Old and Middle English. (He even taught himself Icelandic when already well into middle age). Knowing the weight of words, Black repeatedly demonstrated the strength of his contextual approach. He also decried the pitfalls of narrow textualism for its false claims to be apodictic truth.

Black also offered appropriate ways to interpret the Constitution in an imperfect world that now are almost completely ignored. His work may now be overlooked, but it is not because Black has been proven wrong. Rather, his ability to cut directly to essential questions and then to identify the best possible responses appears to threaten accepted doctrine and methodology. He challenged the urge toward “normalcy,” to doing things as they have been done. Though he worked well within the parameters of the law, Black directly challenged the inherently conservative professional habits of law professors, lawyers, and judges.

#### VIII. STATE ACTION, FEDERALISM, AND CONSTITUTIVE CONSTITUTIONALISM

Black asked elemental questions in his work on state action and federalism. In the 1960s, for example, Black litigated (ultimately unsuccessfully) a challenge launched by the NAACP Inc. Fund against the exclusion of blacks from a segregated park left by the notoriously racist Senator Augustus Bacon in his will to the city of Macon, Georgia. In his remarkable “Foreword” to the Harvard Law Review in 1967,<sup>41</sup> Black posed a straightforward challenge concerning what he called the most important problem in American law. Why, he asked, do we require state action in the context of the Fourteenth Amendment?<sup>42</sup> He demonstrated persuasively why the search for “state action” is an unduly complicated dead end. To make proof of state action a necessary precondition for invoking basic constitutional protections is a costly distraction that makes neither logical nor historical sense. If anything, however, the state action restriction has tightened considerably, even in the context of race discrimination, since Black so cogently litigated and wrote about the matter in the 1960s.

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<sup>41</sup> Foreword: “State Action,” *Equal Protection, and California’s Proposition 14*, *supra* note 19, at 69.

<sup>42</sup> *Id.*

In much of his other work, partially by using as a benchmark the broad federalism accepted in admiralty law, and more generally by attending to the structure and relationship inherent in the post-Civil War amendments, Black offered a powerful critique of the doctrine of “Our Federalism.” In his last book, he was chagrined to find how extensively recent American constitutional law has been haunted by the arguments of John C. Calhoun.<sup>43</sup> Yet Black remained convinced that Lincoln’s faith in national citizenship rights ultimately had to prevail rather than the “grisly undead corpse of ‘states rights.’”<sup>44</sup> *A New Birth of Freedom* is a sparkling effort to aid that liberating cause.

Black’s concern for the relationships of people centered on issues of responsibility. His writing about constitutional law focused repeatedly on core obligations owed to others. This was also central in his work in admiralty law and equity. It was a resonant theme in his three books of poetry as well. To Black, it was painfully clear that racism “defiles our covenant with each other and with the world.”<sup>45</sup> He explained that “separate but equal” and “no state action” are “fraternal twins” that have served as “the Medusan caratyids upholding racial injustice.”<sup>46</sup> In his decades of work within the NAACP Inc. Fund team, Black’s lawyerly activism sought the basic legal protection owed the vulnerable as well as the equality promised to all citizens by the Fourteenth Amendment.

Throughout Black’s many books on constitutional interpretation, impeachment, the death penalty, and Congress, he never abandoned the internal norms of law and the craftsmanship of lawyers.<sup>47</sup> But, Black insistently added, “[A]ll law works from level to level, with commitment to great general principles that have to be

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<sup>43</sup> A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED, *supra* note 34, at 69-85.

<sup>44</sup> *Id.* at 80.

<sup>45</sup> Foreword: “State Action,” *Equal Protection, and California’s Proposition*, *supra* note 19 at 70.

<sup>46</sup> *Id.*

<sup>47</sup> This helps explain, for example, why the short impeachment book he wrote in the course of one week in 1974 - some say he produced it in a single weekend - remained the basic reference during another presidential impeachment crisis several decades later. See CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK (1974).

worked into practice through insight and experience.”<sup>48</sup> He saw the U.S. Constitution as a legal document that enables rather than restricts the rights of Americans. This view could hardly contrast more starkly with the dominant approach among a majority of today’s Supreme Court Justices. We live in a time that embraces what Black called “a myth that lawyers must think small, even meanly, or lose the aura of professionalism.”<sup>49</sup> The classic Black model presents a more generous but also an intellectually more compelling alternative. Black’s ability to merge a notably hardheaded and critical approach to legal doctrine with heartfelt empathy provided the foundation for his brilliant writing.

More than anyone before, Black stressed that the Constitution was, is, and should be understood to be constitutive; it is neither accurate nor wise to regard it as a limiting document. In his view, the Constitution self-consciously launched an experiment in government intended to afford power and legitimacy sufficient to make that experiment work for all the nation’s citizens. The primary role for judicial review is to help legitimate the power of government over time. He dedicated *A New Birth of Freedom* to “the sacred memory of Abraham Lincoln,”<sup>50</sup> and he often remarked that it was Lincoln’s path that he tried to follow.<sup>51</sup> The connection Black felt to Lincoln was deep and profound; both were exceptional wordsmiths, both were dedicated to unfettering freedom through law. To Black, Lincoln symbolized the importance of recognizing that the Constitution could be improved, could change — particularly in practical pursuit of the unfulfilled, bold promises of the Declaration of Independence.

IX. CHARLES BLACK: “INVENTOR OF THE UNIMAGINABLE . . .  
INTERPRETER OF THE PREVIOUSLY INVISIBLE”

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<sup>48</sup> A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED, *supra* note 34, at 36.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at unnumbered dedication page.

<sup>51</sup> Black was pleased to point out that his birthday, September 22, fell on the anniversary of Abraham Lincoln’s promulgation of the Emancipation Proclamation.

In addition to his noteworthy professional successes, Black understood and played the role of unforgettable character with enthusiasm. So it was wonderful, but not surprising, to hear Black's unrepentant Texas twang when he played Cicero in a production of "Julius Caesar" produced by the Yale Repertory Theater in New Haven. There is some dispute as to whether he even tried to suppress his accent, but one can just hear Black asking Robert Brustein, the head of the theater, "Bob, why do you think a first century Roman would speak with a New York accent?"

In her wonderful memorial essay,<sup>52</sup> Charles's daughter, Robin, described him as "melancholic by nature."<sup>53</sup> His ongoing struggle against worries, fears, and doubts helps explain Charles Black's stunningly creative engagement with life. This took many forms; including conversationalist, poet, painter, harmonica player, actor—and even as a jogger who looked as if he were about to expire if he took another step. An indelible image of Charles Black for me is the way he played his harmonica for my young son.<sup>54</sup> Charles, who was taught to play when he was ten years old by Buck Green, a seventy-five-year-old former slave whom he said "still plays harmonica through my mouth,"<sup>55</sup> did not merely wish to entertain. He had something important to pass on, and a formidable sense of what we owe our posterity. There was some of Harpo Marx at his best, but the scene as Charles enthusiastically played for my giggling little boy somehow was both funnier and more serious than that.

As Robin noted, "He was an inventor of the unimaginable and an interpreter of the previously invisible."<sup>56</sup> Charles also had a wonderful instinct for "the strength of symbol when it is backed up by the real thing."<sup>57</sup> Robin explained how this sense played out in the

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<sup>52</sup> Robin Black, *In Memoriam - Charles L. Black, Jr.*, 102 COLUM. L. REV. 892 (2002).

<sup>53</sup> *Id.* at 893.

<sup>54</sup> Charles Black enthusiastically played harmonica for a very young and receptive Raphael Moshe Booth Soifer during several visits in the early 1980s.

<sup>55</sup> *My World with Louis Armstrong*, *supra* note 1, at 1597.

<sup>56</sup> Robin Black, *supra* note 51, at 893.

<sup>57</sup> *Id.* at 894.



quotidian details of Charles's family life, but Charles also applied his keen instinct to illuminating how law ought to function in the pursuit of justice. He was a master of the paradoxical and enlightening juxtaposition, and he employed the text of the Constitution to annihilate claims of narrow textualism. There is powerful logic that under girds his basic argument that law cannot and should not be like logic. By reading carefully and arguing powerfully and with great originality, Charles Black challenged his readers to ponder whether the methodology that dominates American constitutional law has even begun to ask the right questions.

For all his laughter and his zest, Black's work is suffused with anticipation of inevitable failure. Nonetheless, we should pursue ideals, he insisted, knowing we will never reach them. Unless we become skillful in "rational methods available to the art of law,"<sup>58</sup> we will never begin to achieve the great promises of our foundational legal documents. To make the effort, to engage with the future as well as with the past, is quite different from what most of us do. Yet it is what law is constituted to do. We may be assured, "if we keep still and listen, that the whole business of decision, of argument, of long and disappointing search for information and solution, is after all worthwhile."<sup>59</sup> To Black, we need realism intertwined with the poetry of law. This entails "the motive for solving problems, the sacred stir toward justice, our priceless discontent at the remoteness of perfect law."<sup>60</sup>

## X. TOUGH LIVING LAW

Black actually delighted in being a contrarian - though he passionately would have preferred to have his arguments widely accepted. Unlike many contrarians, however, his intellectual boldness sprang from deep within the four corners of the ongoing debate. For example, Black interpreted the Constitution as a text through the use

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<sup>58</sup> CHARLES L. BLACK, JR., ON READING AND USING THE NINTH AMENDMENT, IN *POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW* 187, 189 (M. McDougal & W.M. Reisman, eds., Martinus Nijhoff, 1985).

<sup>59</sup> Charles L. Black, Jr., *The Two Cities of the Law*, in *THE OCCASIONS OF JUSTICE, ESSAYS MOSTLY ON LAW* 17, 31 (1963).

<sup>60</sup> *Id.*

of customary legal tools. He did not rely on reasoning across disciplines, on historic revisionism or economic theorizing or the like. Frequently, in fact, he explicitly sought middle ground, and he almost always emphasized the importance of context. When Black took on “judicial restraint,” for instance, he understood that he faced the weight of a powerful slogan. He also conceded that “judicial deference” is like water or medicine: the concept is simultaneously indispensable and potentially lethal. But courts also represent the people, and there is “reality in the belief that courts can and do approach the task of decision in a way peculiar to themselves.”<sup>61</sup> In our nation’s longstanding and ongoing support for the strange institution of judicial review, Black claimed, “the American people...can be trusted, because they do not trust themselves.”<sup>62</sup>

Black warned forcefully against the common tendency to turn slogans such as “judicial restraint” into a form of idolatry. He had an uncanny ability to think and write with such breathtaking freshness as to enact his claim that “the first job of common sense . . . is to dust away a lot of spurious ‘common sense’ that does not deserve the name.”<sup>63</sup> He insisted that any quest for neat binary choices, mathematical demonstration, and logical proofs does not suit the way we go about interpreting and applying law. Moreover, we often make basic mistakes in failing to heed appropriate differences regarding orders of magnitude.

Black once argued in a well-known *Harper’s Magazine*<sup>64</sup> article, for example, that the right not to be tortured could not literally be an absolute right. Yet, he claimed, it does not and must not be allowed to follow that assessing the right to be free from torture is simply a matter of balancing that right against convenience or comfort or safety. It matters how you get there. Legal issues do involve questions of degree, but law also must take matters “down to common life” in its never-ending pursuit of justice. The goal, he proclaimed, is

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<sup>61</sup> THE PEOPLE AND THE COURT, *supra* note 25, at 136-137.

<sup>62</sup> *Id.* at 105.

<sup>63</sup> Charles L. Black, Jr., *Paths to Desegregation*, in THE OCCASIONS OF JUSTICE, ESSAYS MOSTLY ON LAW 149 (1963).

<sup>64</sup> Charles L. Black, Jr., *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, HARPER’S MAGAZINE, Feb. 1961, at 63.

“tough living law - law that will listen to reason a long time but will, in the end, inexorably assert a reason of its own.”<sup>65</sup>

Black’s love of language and his sense of humor filled his writing with surprises. For example, no one could previously have understood fully that the holding in *Marbury v. Madison*<sup>66</sup> was “not an elephant breaking through Arctic waters with a fish in its mouth.”<sup>67</sup> Judicial review already had been around, and even Congress embraced the notion with repeated and increasing emphasis in the years after *Marbury*. Black’s wonderful, weird elephant metaphor - with its antic hints of James Thurber, but also its echo of late-night conversations with clever, creative friends - served to underscore an important point of legal realism that, in turn, helped support the Warren Court’s interventions on behalf of basic civil rights.

#### XI. RECOGNIZING KINSHIP AND THE SOVEREIGN PREROGATIVE OF LAUGHTER

In *The Lawfulness of the Segregation Decisions*,<sup>68</sup> Black’s famous, unanswerable article defending *Brown* against its many distinguished academic critics, he invoked “one of the sovereign prerogatives of philosophers - that of laughter”<sup>69</sup> to answer the claim that separate could be equal in America. In retrospect, it is hard to believe that many leading constitutional scholars offered powerful critiques of the *Brown* decision. In addition to Herbert Wechsler’s concern about the Court’s departure from neutral principles, skeptics attacked the Court for not demonstrating sufficient judicial restraint and for becoming embroiled in a realm that should have been left to the more political branches of government. Some derided the Court for its failure to take into account the constitutional freedom of white citizens to refuse to associate with other citizens when they chose not to do so.

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<sup>65</sup> Another elusive citation, almost surely from one of Black’s books. See e.g., *supra*, note 38.

<sup>66</sup> 5 U.S. 137 (1803).

<sup>67</sup> *THE PEOPLE AND THE COURT*, *supra* note 25, at 78.

<sup>68</sup> Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

<sup>69</sup> *Id.* at 424.

Powerfully recalling his own experience growing up in Texas, Black pulverized such claims. He directly attacked the false allure of formal equality and judicial restraint in the context of segregation. Black emphasized the well-understood and insidious message within the unwritten law of segregation: “When you are in Leeville and hear someone say ‘Leeville High,’ you know he has reference to the white high school; the Negro school will be called something else—Carver High, perhaps, or Lincoln High to our shame. That is what you would expect when one race forces a segregated position on another, and that is what you get.”<sup>70</sup> He detailed the daily insult and the pervasive inequality of racial separation, in matters small and large that necessarily followed. It was a system instituted and continued to accomplish the “designed and generally apprehended effect of putting its victims at a disadvantage.”<sup>71</sup> And he was hardly timid in demonstrating that segregation was “set up and continued for the very purpose of keeping [the Negro race] in an inferior station.”<sup>72</sup> Because “[t]he fourteenth amendment commands equality, and segregation as we know it is inequality,”<sup>73</sup> Black declared that the Court’s judgments in *Brown* were as “right and true as any that ever was uttered.”<sup>74</sup>

“[T]he failure to recognize kinship”<sup>75</sup> is devastating and tragic, and courts must say so. Indeed, Black later insisted, “public insult by law is, without more, a denial of ‘equal protection . . .’”<sup>76</sup> Segregation could not fit the promise of American law—and it clearly had to be dismantled through law. To Black, however, academics are often “self-vaunting.” They tend to protest too much about their personal opposition to racism, for example, while claiming that it is a detached and principled commitment to neutrality that requires them to criticize

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<sup>70</sup> *Id.* at 425.

<sup>71</sup> *Id.* at 428.

<sup>72</sup> *The Lawfulness of the Segregation Decisions*, *supra* note 67, at 424.

<sup>73</sup> *Id.* at 428.

<sup>74</sup> *Id.* at 430.

<sup>75</sup> *Paths to Desegregation*, *supra* note 62, at 160.

<sup>76</sup> Charles L. Black, Jr., *THE OCCASIONS OF JUSTICE, ESSAYS MOSTLY ON LAW* vii (1963).

decisions such as *Brown* as they look on from above the fray. Such elusive abstractions evaporated in the sunlight of Black's talent for crisply capturing underlying harsh reality. In contrast to lessons about racism learned from life on the ground or from a soaring trumpet, legal arguments offered by those who pride themselves on "espousing arguments that lead to unpleasant conclusions" run the risk of playing "the most dangerous of games—that of defrauding ourselves."<sup>77</sup>

That game is immensely popular today. Indeed, a puzzle may help us grasp why in the future the work of Charles Black almost certainly will be regarded as more influential than it is today—an era when we seem to relish self-interest as both explanation and goal in law. The dilemma: How did such a great practical lawyer—and a committed, clear-thinking realist – remain an optimist, even an idealist, about law? After his own close, astute, and critical observation of the United States Supreme Court, for example, how could Black remain uncynical and continue to be surprised by the shoddy work product and the grievous deficits in both mercy and justice to be found permeating the opinions of the Justices?

Part of the answer may be found, I think, in Charles' comfort in living with contradictions and within paradoxes. In the 1950s, Charles gave a commencement speech to high school students that focused on the irresolvable ways in which "the world is a place of contradiction and mystery."<sup>78</sup> To be fully human, Charles explained, "is to live to the fullest measure both in the society that is the essence of humanity and in the loneliness that is the essence of humanity, somehow trying to treat each as though it were everything."<sup>79</sup>

Another part is anchored in Charles' magnificently humane imagination. His far-reaching qualities of empathy and understanding made it very hard for him to believe that there are so many judges who lack adequate imagination, humanity, and a sense of justice and mercy. Charles kept the faith - despite all the miscarriages of justice he saw and understood as such - that the usual lawyer's tools of presumptions, preponderance of the evidence, close reading, attention

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<sup>77</sup> THE PEOPLE AND THE COURT, *supra* note 25, at 100.

<sup>78</sup> Charles L. Black, Jr., *Commencement Address, Storm King School, in THE OCCASIONS OF JUSTICE, ESSAYS MOSTLY ON LAW* 207 (1963).

<sup>79</sup> *Id.* at 212.

to context, cogent argument, and the like ought to and frequently would prevail.

Indeed, this deep belief may help explain why Charles was not sympathetic when some of us made trouble as law students in the late 1960s, challenging law schools as well as the Viet Nam war and other injustices. In retrospect, it seems clear that he thought we ought to learn how to utilize the weapons of the law, rather than to reject them before we even fully understood our target. On the other hand, more than other professors at the time, Black advised us not to be ground down by law. He went so far as to assure us that we could survive and not be crushed even by law school. For many of us, listening to Louis Armstrong records and to Charles' conversation during his annual Louis Armstrong Night ranked high among the most memorable moments in our legal education.

Charles displayed a wonderful mix of down-to-earth practicality and dreaminess that somehow uncomplicated abstractions and made the pursuit of justice an immediate, real possibility. As he put it: "We talk about the protection of our fellows from the suffering and indignity of want as though it were a matter of taking Mount Rainier under one's arm and jumping over the Pacific Ocean, when in fact it is a matter of deciding whether or not to help a frail person lift something that we can ourselves lift."<sup>80</sup>

So long as a frail person needed help to lift something and one is able to provide that help, there could be no cynicism and no withdrawal. Charles had a keen understanding of human frailty, and he led the way as he elegantly and forcefully described an ongoing obligation to do some heavy lifting through law. This included the past, to be sure, but Charles emphasized change. With optimism, he willed a focus on the future.

We have much to learn about remaining undefeated by injustices within law as it now stands. Often the inequitable status of the status quo seems particularly egregious in Hawai'i and across the Pacific. Yet if anything, this underscores the importance of crucial lessons taught by Charles Black about the need for judges and lawyers to combine creativity, craftsmanship, and committed courage.

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<sup>80</sup> CHARLES L. BLACK, JR., *The Humane Imagination in the Great Society*, in *THE HUMANE IMAGINATION* 1, 10 (1986).

## XII. MIND AND HEART: “THE BRINGING DOWN TO EARTH OF JUSTICE TEMPERED BY MERCY”

The winter before Charles died, I had occasion to visit him. By then, his long illness had weakened him substantially, and he was sleeping much of the time. It took hours to help him get ready for a visitor. I found him propped up, but sitting in a chair, chain-smoking cigarettes because it didn't matter anymore. He still had his handsome, soulful, dry riverbed look, and his dark eyes flashed as he spoke with passion and laughed about the rampant folly in the world. We both knew this was likely to be our last encounter, so there was more philosophizing than usual.

It was a memorable visit during which Charles was cogent and vehement as he echoed several of his enduring themes and metaphors. He explained that he had “made a career of building an edifice around the obvious.”<sup>81</sup> He added that he was particularly pleased by the favorable reviews of *A New Birth of Freedom*, explaining that he was “too old to try to suppress vanity” about the book, published in his eighties, that was “written for all our grandchildren.” Mostly, however, Charles wanted to discuss the intricacies of the presidential election recount and the litigation surrounding it. He was passionate, partisan, up-to-date, and appalled. As we parted, Charles lifted his arm in a grand farewell salute, and declared, “The mind is still strong, and so is the heart.”<sup>82</sup> Reasoning from commitment remained his vital theme.

As a lawyer, scholar, teacher, conversationalist, wordsmith, dreamer, and as a complex, engaging, and wonderfully different human being, Charles Black, Jr. personified an enduring, deep commitment to the active pursuit of law realizing equity. To make law intensely practical, he believed some people must do theory. It was, he said, crucial not to be fooled by “vulgar false practicality” in the course of “a tough practical job to work at - the bringing down to earth of justice tempered by mercy.”<sup>83</sup>

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<sup>81</sup> Our last visit was December 4, 2000. It was so poignant and yet encouraging that I took the rare step of writing down some notes immediately thereafter, a copy of which is on file with the editors.

<sup>82</sup> *Id.*

<sup>83</sup> Charles L. Black, Jr., *A Tribute to Jerome Michael*, in *THE OCCASIONS OF JUSTICE, ESSAYS MOSTLY ON LAW* 204 (1963).

Throughout his career, Charles stated repeatedly that no “waxen simulacrum”<sup>84</sup> could be allowed to take the place of our Nation’s longstanding, fundamental promises guaranteeing human rights. Those promises required combining a keen ear for what is basic with an ability to innovate, as well as a sense of audience and a healthy dash of showmanship, too. Charles taught and exemplified law as an art, and he viewed the world as a poet. In his embrace of the art and soul of law, he merged the legal dancer and the dance with unprecedented forceful grace.

Charles Black did tough practical law jobs as they never had been done before because as a poet he knew the accuracy and power of metaphor. For Charles, the law is a metaphor of how life is supposed to be. “The Two Deals,” a poem in *The Waking Passenger*,<sup>85</sup> one of Charles’ three books of poetry, concludes: “Everywhere is a prisoner.”<sup>86</sup> But another poem in the same collection ends: “Act love/Imperfectly; you will remember love itself.”<sup>87</sup>

### XIII. CONCLUSION: VISIONS ACROSS OCEANS

The late Israeli poet Yehuda Amichai once said, “A poet’s state of mind is seeing the world with a kind of double exposure, seeing undertones and overtones, seeing the world as it is.”<sup>88</sup> Charles Black, Jr. saw the world as it is. With indomitable flair, his remarkable riffs worked to change it.

It is no exaggeration to note that the beauty and importance of language is more evident in Hawai’i than in the continental United States. And the empathetic power of music that linked and changed the lives of Charles Black, Jr. and Louis Armstrong is also potent and

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<sup>84</sup> A NEW BIRTH OF FREEDOM, *supra* note 34, at 78.

<sup>85</sup> CHARLES L. BLACK, JR., *THE WAKING PASSENGER* (1983).

<sup>86</sup> CHARLES L. BLACK, JR., *The Two Deals*, in *THE WAKING PASSENGER* 77 (1983).

<sup>87</sup> CHARLES L. BLACK, JR., *Letting Go*, in *THE WAKING PASSENGER* 12 (1983).

<sup>88</sup> Mel Gussow, *Yehuda Amichai, Poet Who Turned Israel’s Experience into Verse, Dies at 76*, N.Y. TIMES, September 23, 2000, at Obituaries, A14.



profound within these beautiful islands. Through these and other means, people in Hawai'i and across the Pacific may be more open than most to sense undertones and overtones and thereby to "see the world as it is."<sup>89</sup> As well as rewarding subtle sensibility, such acute perception imposes a deep obligation, perhaps even more upon lawyers than on most people. We are challenged to delve beneath "false practicality" and instead to perform what Black aptly described as the "tough practical job . . . the bringing down to earth of justice tempered by mercy."

In dealing with different laws and legal systems across Asia and the Pacific, we wrestle continually with jagged practicalities in the struggle for real equality. Yet it is also crucial to make "proper discriminations between things essentially different."<sup>90</sup> And we cannot forget the basic obligations that are imposed by human kinship, reflected by law at its best. Indeed, committed lawyers are key to unlocking past wrongs while also pursuing mutual liberation that points us towards a better future.<sup>91</sup> As Charles Black taught and exemplified: "Law is and forever will be technicality. But law is also insight and wisdom and justice."<sup>92</sup>

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<sup>89</sup> The Hawaiian word "kaona," for example, is defined as "hidden meaning as in Hawaiian poetry" or "words with double meanings that might bring good or bad fortune." Mary K. Pukui & Samuel H. Elbert, *HAWAIIAN DICTIONARY* (rev. ed. 1986).

<sup>90</sup> *THE PEOPLE AND THE COURT*, *supra* note 25, at 221.

<sup>91</sup> John Osorio's final chapter, "Ho'oulu Lāhui," cogently connects the problematic power of law and the vital role of kinship in Hawai'i. Osorio, *DISMEMBERING LĀHUI*, *supra* note 8, at 250-60. Eric Yamamoto, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999) offers glimmerings of hope even for the difficult work of future reconciliation.

<sup>92</sup> *THE PEOPLE AND THE COURT*, *supra* note 25, at 182.